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No. 99-_____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHIRLEY C. WILBANKS,

Petitioner

versus

A.H.ROBBINS. CO., INC. a Virginia Corporation,
by service on the Dalkon Shield Claimants' Trust

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

Whether or not the Federal summary judgment ruling of the United States Magistrate as affirmed by the Court of Appeals for the Fifth Circuit is a departure from the precedent of the Mississippi Supreme Court on the time of accrual of a latent defective product personal injury cause of action and holds a layperson to a level of knowledge not available during the relevant time of a medical doctor and disregards the general lack of knowledge of the defect by the scientific community during the same time frame.

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Legend

R = Record

V = Volume

p = page; pp = pages

OPINIONS AND ORDERS BELOW

The final opinion of Fifth Circuit Court of Appeal was filed on September 15, 1999 and is reproduced in the Appendix at pages 1-3. The opinion of the United States District Court is reproduced in the Appendix at pages 4-7 with the judgment of the United States District Court for the Northern District of Mississippi reproduced in the Appendix at page 8.

JURISDICTION

The final opinion of the Fifth Circuit Court of Appeals was entered September 15, 1999 and this petition is being filed within ninety (90) days of said opinion. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Shirley C. Wilbanks, appellant, filed this suit pursuant to a court order attached as Exhibit "A" to the Complaint. (R V I, p. 16) The parties consented to trial by the Magistrate Judge. This appeal originated from an order and opinion granting summary judgment to the Dalkon Shield Claimant's Trust dated June 8, 1998, on all eight of Mrs. Wilbanks' claims by the Trial Court applying the six year Mississippi Statute of Limitations to said claims. (R V IV, pp. 927-931.) The Court stated Mrs. Wilbanks knew or should have known of her claims and failed to file by January 21, 1980, which is six years prior to the date the Trust confirms Mrs. Wilbanks filed her claim. (R V IV, pp. 427-930.) Mrs. Wilbanks' Complaint reflects she knew of her claim in 1985 and by 1986 by her deposition

knew of her claim in 1985 and by 1986 by her deposition testimony and her claim was filed with the Trust on January 21, 1986, according to the Trust.

The Amended Complaint and Demand for Jury Trial (R V I, pp. 20-42) reflects (R V I, p. 22), "Plaintiff Shirley C. Wilbanks, only became aware of her right to a cause of action against the Defendant many years after her injury. To the best of Plaintiff's present knowledge, she first became aware of her claim in 1985 when Mississippi had a six year period of limitations and timely filed all claims with the Trust." Shirley Wilbanks designation of expert witnesses (R V I, pp. 150-152) includes the opinion of Ronald D. Henderson, M. D. (R V 1, p. 157) in the form of a statement dated March 12, 1998, which states, "It is my opinion that the presence of the Dalkon Shield was probably the etiology, within a reasonable degree of medical certainty and probability, of the spontaneous abortion. Based upon general knowledge of the Dalkon Shield, we now know that the multi-filament tail on the Dalkon Shield was responsible for an ascending infection resulting in endometritis and ultimately chorioamnionitis". The opinion concludes, "The entire IUD controversy took place during my (31) years of practice." Dr. Henderson distinguishes a present state of medical knowledge from a state of medical knowledge in 1972 when the spontaneous abortion occurred and the ensuing years of IUD controversy with developing knowledge.

The stipulation of the parties (R V I, pp. 168-170) reads at Paragraph IV (R V 1, p. 169), "For the purpose of increasing judicial efficiency and streamlining the issues for trial, the parties have agreed to limit the issues to be tried in this case to those of causation of any injuries claimed by the Plaintiff, and damages, if any . . . This agreement shall not be construed to preclude the Trust from presenting evidence rebutting Plaintiff's contention that the Dalkon Shield was the cause of Plaintiff's claimed injuries, nor shall the agreement preclude

the Trust from asserting any of the affirmative defenses which it has raised in its pleadings . . . The parties agree that the Plaintiff's burden, therefore, is to establish by a preponderance of the evidence that the Dalkon Shield proximately caused the injuries which she has alleged, and to establish by a preponderance of the evidence those damages for which she seeks to recover from the Trust. The Trust specifically reserves the right to establish, by a preponderance of the evidence, any of its affirmative defenses, including the defense that this action is barred as a matter of law by applicable statutes of limitations."

The Dalkon Shield Claimant's Trust filed its motion for summary judgment with exhibits (R V II, pp. 183-467) which included as the only record cited in the Trial Court opinion Exhibit "A", thereto the deposition of Shirley C. Wilbanks (R V II, pp 191-423). A revised motion was filed. (R. V. II, pp. 509-515). The Trust Motion for Summary Judgment states at Footnote 1 (R V II, p. 183), "For purposes of the instant motion only, the Defendant accepts as true statements of fact contained in Plaintiff's deposition and Amended Complaint and Demand for Jury Trial." (R V II, p. 509)

Appellant Shirley C. Wilbanks filed her motion response and (R V III, pp. 521-777) responded to the allegation that her causes of action had accrued for a period of time of more than six years preceding the date of filing her claim (R V III, p. 524), that she did not have knowledge as to any cause of action until near the time she filed the claim, and if the Court found that she did that, the period of limitations was tolled by Robins fraudulent concealment. The Amended Complaint and Demand for Jury Trial reflects in Paragraph V of same at page 2 that Shirley Wilbanks first became aware of her causes of action in 1985. Mrs. Wilbanks' deposition reflects her sworn testimony that she first became aware of her causes of action in 1986. (R V II, pp. 353, 254, 246, 247) Mrs. Wilbanks

testified that she was unaware of publicity surrounding the Dalkon Shield and had seen only one article relative to the Shield sometime in 1985 or 1986. (R V II, pp. 245-247) The Dalkon Shield Claimant's Trust states that Mrs. Wilbanks filed her claim with the Trust on January 21, 1986. (R V II., p. 187) Mrs. Wilbanks testified (R VII, p. 210) that she received her real estate license in January of 1986 at a time she worked at Coldwell Banker West Realty, which coincided with the time she read the noted article and soon afterwards filed her claim. The testimony of Mrs. Wilbanks shows she filed her claim within one month of knowledge of her claim.

Mrs. Wilbanks testified about a conversation with friend Peggy White in 1972 and confided to her that at the time she thought the Dalkon Shield had "slipped" and was "inside of her." (R V II, pp. 234-235). Mrs. Wilbanks testified she talked to friend Cathy Coleman about what happened to her and her sadness in losing a baby. (R V II, p. 236). Mrs. Wilbanks testified that she discussed the Dalkon Shield with friend Peggy Faulkner and told her that the Shield had "caused pain." (R V II, p. 48) Note that none of the confidences reflect that the Shield caused anything except "pain" or a "sticking feeling." Mrs. Wilbanks testified she read nothing about the Dalkon Shield until she read an article from a newspaper in 1986 sent to her. (R V II, pp. 245-246) This is the point in time that Mrs. Wilbanks testified as stated in her Amended Complaint, that she first connected the Dalkon Shield with more than a possible answer as to why she had lost her baby in 1972 and her later developing medical problems culminating in a 1980 hysterectomy. Prior to that time Mrs. Wilbanks had read nothing about the Dalkon Shield or seen anything about it on television. (R V II pp. 246-247)

Mrs. Wilbanks' only prior information about the Shield before its use was that it was not 100% effective against pregnancy. (R V II, pp. 285-286) Mrs. Wilbanks testified that

she told Dr. Henderson, the attending physician who detected her pregnancy with the Shield in place in August 1972, that she thought something was "not right, she thought the Shield was inside her and could feel it sticking." (R V II, p. 297). This is a patient explaining symptoms to a doctor. Mrs. Wilbanks testified that Dr. Henderson's reaction to this at that point was that he thought she was "imagining it". (R V II, p. 301). Dr. Henderson's explanation to Mrs. Wilbanks in 1972, unlike his 1998 opinion, was simply that he could not understand what could be causing the problem. (R V II, p. 301). Mrs. Wilbanks' own doctor reacted to her as if her suspicion was a result of imagination.

"Suspicion" is what the Trial Court says triggered the accrual of the cause of action. (R V VII, p. 927.) In 1972 Mrs. Wilbanks' own doctor told her, "he did not think so," as to whether the Shield was present when the pregnancy was first diagnosed. (R V II, pp. 304-313). Dr. Henderson told Mrs. Wilbanks "he could not understand what the problem was." (R V II, p. 305).

Subsequent to Mrs. Wilbanks' 1972 miscarriage and surgery relative to the loss of the baby, she then asked Dr. Henderson if he had found the Shield and he said, "Yes, it was in with the baby". Dr. Henderson did not state in 1972 or tell Mrs. Wilbanks at the time or any time until 1998 that the Shield caused the miscarriage, but simply confirmed the fact of locating the Shield. (R V II, p. 305). Mrs. Wilbanks actually questioned, "I suppose we can assume the Dalkon Shield caused this?" And he stated, "Well, let's don't jump to conclusions." Mrs. Wilbanks knew she was pregnant and seeks damages for the toxic induced miscarriage and other damages. (R V II, p. 308). Mrs. Wilbanks stated Dr. Henderson was "evasive" in 1972 and "did not want to talk about it." (R V II, p. 120).

Mrs. Wilbanks subsequently had a tubal ligation after

a difficult but successful pregnancy attended by Dr. Harrington who became concerned about Mrs. Wilbanks not being able to carry another child. Mrs. Wilbanks testified Dr. Harrington told her that her muscles "were not in good shape, they were damaged." (R V II, pp. 321-322). Nowhere does Dr. Harrington assert whether the Dalkon Shield caused the muscle damage or the miscarriage. Mrs. Wilbanks suspected damage was due to the miscarriage but damage from a miscarriage is not synonymous with damage from use of an IUD. The toxic induced eruption of the amniotic bag with the fetus in 1972 may or may not have been connected to use of an IUD and the fetal expulsion damage itself is a traumatic physical event that may cause damage as well as the surgical tools used for the necessary D&C uterine scraping. (R V II, p. 321). It is Mrs. Wilbanks' belief that the Dalkon Shield caused a series of injuries that developed prospectively historically from 1972 to 1980, but no doctor told her so prior to filing her claim although she asked four doctors and one nurse. (R V II, p. 325) The expert opinion affirming the causal connection between the damage and the Shield use is not dated until after the claim was filed. Doctors told Mrs. Wilbanks there was a "possible" relationship between the Shield use and her damages, but no doctor had ever told her that any of her problems had been caused by the Shield as of her deposition date of January 22, 1998. (R V II, pp. 325-327).

Dr. Perrin Smith reviewed Mrs. Wilbanks' medical history in 1974 or 1975 of having a Dalkon Shield and heard her belief that it may indicate problems, but "he did not place any responsibility with it." (R V II, p. 326). Mrs. Wilbanks asked and then accepted and relied on the representations of her successive treating physicians as accurate in her continuing search for answers to the cause of her loss of the baby followed by eight years of developing problems. (R V II, pp. 329-330). Defense counsel closely questioned Mrs. Wilbanks, "And so

that I am clear on what I understand to be your claim, no physician has ever affirmatively stated to you that any of your complaints that we have talked about thus far are related to the Dalkon Shield, is that correct?" Answer, "That is correct." (R V II, pp. 350-351). Mrs. Wilbanks concluded, "I suspected that the Dalkon Shield caused my problem and when I read about it in the article that I have made reference to I felt at that time, yes, it is responsible for it. I felt I just did not have any doubt and I felt at that time I needed to act on it." She reiterated, "I suspected it-- I suspected it contributed, I did not know. I felt, when I read this article, I felt it had actually caused it, before then I felt it had something to do with it." (R V II, pp. 353-354). The Defendant's motion states that the facts stated in the Amended Complaint and Mrs. Wilbanks' deposition are taken as true. Any ambiguity in Shirley's testimony is construed in her favor as a matter of law. Both the Amended Complaint and the deposition reflect that Shirley Wilbanks did not know of a cause of action until 1986.

The facts as to Mrs. Wilbanks' allegation of fraudulent concealment are much like a factual and legal flipside, for analytical purposes, of lack of knowledge of accrual of a cause of action as the fraudulent concealment doctrine assumes a one-on-one relationship between the individual duped and those concocting the fraud and concealment. It seems impossible to apply a consumer based fraud set of facts to the benefit of an individual member of the consumer class defrauded using fraudulent concealment There is no need to apply the doctrine of fraudulent concealment in subject case as the cause of action accrued, at most, less than a year into the six year period of limitations at the time Mrs. Wilbanks filed her claim. The lack of knowledge by Mrs. Wilbanks is probably due to the her rural residency and successful fraud marketing effects of Robins which since have been determined true in prior cases. Ballew v. A. H. Robins Company, 688 F.2d 1325 (11th Cir. 1982) The

present state of law on fraudulent concealment is an endorsement of the success of a comprehensive wide-spread fraud against member users of a consumer product which injures many as an individual under the current law of fraudulent concealment can successfully use that doctrine only if the one-to-one relationship between the fraud perpetrator and fraud victim exists. A mass fraud escapes successful use of this doctrine. This is an unequal application of law allowing victory to those with the most broad based successful fraudulent conduct such as that of the A. H. Robins Company and as a doctrine presently fails to meet the legal contours of strict liability for an individual victim.

This civil action was filed by Shirley C. Wilbanks, a resident of Lowndes County, Mississippi, with the Federal District Court for the Northern District of Mississippi, Eastern Division, asserting eight products liability causes of action against the Dalkon Shield Claimant's Trust hereinafter "Trust". The Trust was established as a result of action of the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, in action in a case styled in Re: A.H. Robins Company, Incorporated, Chapter 11, Case No. 85-01307-R, Retained Proceeding (Judge Merhige) to administer all remaining claims against the A. H. Robins Company, a Virginia corporation, which had taken bankruptcy in said Court's jurisdiction and venue. Jurisdiction was originally invoked pursuant to 28 U.S.C. § 1331 and § 1332 based on diversity and pursuant to 28 U.S.C. § 1334(b). A written and agreed stipulation was entered into by the parties and is reflected in the record. (R V I, pp 168-170.) This was approved by Court Order. (R V II, pp 171-174.)

ARGUMENT

The Magistrate Judge in his Memorandum Opinion reflects his finding that Shirley C. Wilbanks testified at her deposition that she believed the Shield had caused the miscarriage. He does not state when she developed this belief. The Magistrate Judge posed the question of when did plaintiff discover or by reasonable diligence should have discovered her injury prior to January 1, 1980? Shirley stated that no one physician positively confirmed or denied the Shield was the cause but several did tell Wilbanks that it was possible. The Magistrate Judge states that plaintiff took no steps to seek expert medical opinions or to consult an attorney to inquire if she had a legal claim against the manufacturer. This ignores the Magistrate Judge's own opinion that she consulted successively four attending physicians with none able to give her causation information. Whether or not her questioning her series of treating physicians is reasonable diligence or that she reasonably could have discovered her causes of action are questions for the jury.

The Firth Circuit Court of Appeals agreed by stating that Shirley C. Wilbanks' action is barred unless she did not and could not have discovered her injuries until after January of 1980. The Fifth Circuit noted that Shirley suspected that the Dalkon Shield IUD was the source of her gynecological problems and rejected the argument that Shirley could not know that the Shield had caused her problems until she had a medical diagnosis of same.

This is a rare but real case where a patient is aware of some injury prior to the expiration of the period of limitations but does not and could not have discovered with reasonable diligence the act or omission which caused the injury. The defect was latent and not known to the medical community according to Dr. Henderson in 1972 but evolved over decades.

In this particular case the cause of action does not accrue, under Mississippi law, until the patient discovers the act or omission which caused the injury, not merely injury alone. The claim does not accrue until the later discovery is made of the act or omission. The cause of action does not accrue until the victim has the medical diagnosis. Barnes v. Singing River Hosp. Systems, 733 So.2d 199 (Miss. 1999) at pp 205 and 206. Also in accord is Donald v. Amoco Production Co., 735 So.2d 161 (Miss. 1999) at p. 166, in which Donald applies a discovery exception relative to the discovery of the facts that would entitle a person to bring an action. The defect of the Dalkon Shield required expert diagnosis, which was sought by the plaintiff, but not given until 1998. In essence, the fact of when Shirley C. Wilbanks discovered her injury from use of the Dalkon Shield is a genuine issue material fact for a jury as the cause of action under Mississippi law accrues only when it comes into existence as an enforceable claim. The defect of the product must have a knowledgeable analysis in order for the claim to accrue. Cannon v. Mid-South X-ray Co., 738 So.2d 274 (Miss. 1999); Prod.Liab.Rep. (CCH) P 15,497.

Cannon, infra, involved a personal injury action where Annie Cannon worked as a darkroom technician using toxic chemicals manufactured by DuPont to develop x-ray film. Annie Cannon suffered many symptoms through time and saw several doctors who did not make any definite diagnosis of her problems. In January of 1992 Annie Cannon's supervisor gave her an article entitled "Darkroom disease" which outlined the symptoms that she was suffering from She then received a diagnosis from a doctor on February 9, 1993 that exposure to chemicals was a major cause of her health problems and then filed suit on August 8, 1995. The Mississippi Supreme Court reaffirmed that the accrual date for a cause of action arises on the date the illness is diagnosed by a doctor. See Cannon, infra at pp. 274 and 276.

Shirley C. Wilbanks, like Cannon, lacks specialized training in gynecological diagnosis and could not reasonably be expected to diagnose what defects of the Dalkon Shield were connected to her ongoing gynecological problems in an area in which the scientific community had not yet reached an agreement. See Cannon at p. 277. Wilbanks, like Cannon, should have the issue of when the accrual of cause of action occurred decided by a jury.

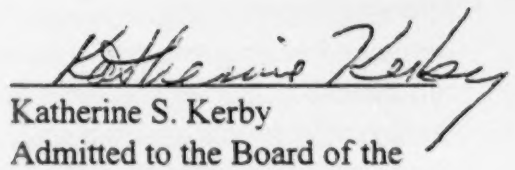
Schiro v. American Tobacco Co., 611 So.2d 962, 964 (Miss. 1992) confirms that there must be a medical diagnosis before knowledge is complete in order for the cause of action to accrue as an enforceable claim. Shirley C. Wilbanks respectfully requests jury consideration of what was reasonable when she did not have a medical diagnosis of its association with her injury until after she actually filed her claim with the Dalkon Shield Trust. This is one of those exceptional cases where the claimant may be aware of some injury prior to the expiration of the limitation period but does not discover and could not have discovered with reasonable diligence the act or omission which caused the injury creating an enforceable claim so the action does not accrue until the latter discovery is made. Citing Smith v. Sanders, 485 So.2d 1051 (Miss. 1986).

CONCLUSION

The application of the statute of limitations by both the Magistrate Judge and the Fifth Circuit Court of Appeals to Shirley C. Wilbanks does not follow the Mississippi law set forth by the Mississippi Supreme Court on the issue of summary judgment relative to the time of accrual of a cause of action of an omission, i.e. latent defective product requiring medically advanced information for accrual to occur. This is a jury issue.

December 6, 1999

Respectfully submitted



Katherine S. Kerby
Admitted to the Board of the
Supreme Court of the U.S.
on May 30, 1995.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60393

SHIRLEY C. WILBANKS, D.S. #D.S. 58827,
Plaintiff-Appellant,
versus
A.H. ROBINS COMPANY, INCORPORATED, a Virginia Corporation, by service on The Dalkon Shield Claimants' Trust; ET. AL.,
Defendants,

THE DALKON SHIELD CLAIMANTS' TRUST,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi (1:97-CV-18-J-A-D)

Before KING, Chief Judge, JONES, and STEWART, Circuit Judges.*

PER CURIAM:
September 15, 1999

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Ms. Wilbanks filed suit against The Dalkon Shield Claimants' Trust, the entity remaining after the manufacturer of The Dalkon Shield, A.H. Robins, Inc., filed bankruptcy. She asserted in January 1986 that she was injured by an I.U.D. manufactured by Robins and inserted in 1971. During a pregnancy in 1972, while the I.U.D. was in place, she suffered injury which made it difficult to carry future pregnancies. The use of the device caused other gynecological problems eventually leading up to a hysterectomy in 1981. The magistrate judge dismissed, ruling that Wilbanks' claim was barred by the six-year Mississippi statute of limitations. Miss. Code Ann. § 15-1-49 (1972) (addendum). Wilbanks' action is barred unless she did not and could not have discovered her injuries until after January 1980.

Based on appellant's deposition, the magistrate judge found that she was aware throughout the 1970s of potentially serious gynecological problems and that she suspected the I.U.D. was the cause of those problems. On appeal, appellant asserts that limitations should not run until she really knew that the injuries were illegally caused by the A.H. Robins product -- and she did not really know this, because her doctors had always equivocated on the cause. Like the district court, we find this contention unavailing and unsupported by Mississippi law.

Construing the relevant statute of limitations, the Mississippi Supreme Court stated:

> The cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease . . . . Though the cause of the injury and the causative relationship between the injury and the injurious act or product may also be ascertainable on this date, these factors are not applicable under

> section 15-1-49(2) [the analog to section 15-1-49].....

Owens-Illinois, Inc. v. Edwards, 572 So.2d 704 (Miss. 1990). The Mississippi Supreme Court thus interpreted the relevant statute in a way that rejects a requirement that the plaintiff know the cause of her injury or the connection between the injury and the injurious product in order for limitations to run. She need only know of the injury itself, as Wilbanks did here.

The other cases cited by Wilbanks are factually distinguishable. For these reasons, the judgment of the district court is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRLEY WILBANKS PLAINTIFF

V. CIVIL NO.1:97CV18-JAD

DALKON SHIELD CLAIMANTS TRUST DEFENDANT

MEMORANDUM OPINION

Defendant Dalkon Shield Claimants' Trust has moved for summary judgment on the ground that plaintiff Wilbanks' claims are time barred. After review of the briefs of the parties and the documents in support of the motion and response, the court is of the opinion that the motion should be granted.

Plaintiff's physician inserted a Dalkon Shield into plaintiff on November 5, 1971. Plaintiff became pregnant in 1972, and experienced "excruciating pain" and a "feeling of a foreign object" in her body which was "sticking" her and causing her pain. Plaintiff expressed to her physician and a friend that she thought the Dalkon Shield might be the cause of her physical problems. The pregnancy ended in a spontaneous miscarriage in September 1972. A D & C was then performed, and the Dalkon Shield was allegedly removed from Wilbanks' uterus during that procedure. She testified at her deposition that she believed that the Shield had caused the miscarriage.

In the fall of 1974 plaintiff became pregnant again and experienced severe cramps, and her physicians confirmed her suspicions that her problems might have been caused by her prior use of the Dalkon Shield. Following this birth, in April

1975, her physician told her she had some muscle damage which again she was convinced had been caused by the Dalkon Shield. Upon the advice of her doctor, plaintiff underwent an elective tubal ligation.

In 1978 Plaintiff's physicians performed a D & C as treatment for heavy menstrual flow and severe cramps, and in January 1980, a complete hysterectomy. Wilbanks testified that at the time she discussed with her physicians her belief that the Dalkon Shield was responsible for both the hysterectomy and for the excessive bleeding and cramping, but none could positively confirm the connection. Wilbanks did not file her claim with the Dalkon Shield Claimants' Trust until January 21, 1986.

The claims asserted by plaintiff are subject to a six- year statute of limitations (§15-1-49, §75-2-725 Miss. Code Anno.). For purposes of this discussion, the court will assume that the Dalkon Shield did, in fact, cause the problems which plaintiff suffered. The question then becomes did plaintiff discover or by reasonable diligence should she have discovered her injury prior to January 21, 1980?

While plaintiff contends that A. H. Robbins, maker of the Dalkon Shield, may well have concealed certain facts about certain dangers caused by use of the shield, there is no evidence that this concealment affected Wilbanks in any way. Wilbanks by her own testimony has made it clear that she knew or reasonably had knowledge of the connection between her use of the shield and her physical problems. She discussed her convictions that the shield was responsible with each physician at every step along the way of her physical care. No one physician positively confirmed or denied that the Shield was the cause but several did tell Wilbanks as early as 1974 or 1975 that such was possible.

In order to prevail on a claim of fraudulent concealment the plaintiff must show some act or conduct of an affirmative

nature designed to prevent, and which does prevent, discovery of the claim. *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988). This conduct must be designed to prevent an injured party such as plaintiff from making her claim. While defendant may have misrepresented the efficacy of the Dalkon Shield, the court has not been presented any evidence that defendant concealed information or misrepresented facts to the plaintiff. In fact, she had no direct communication with defendant. Moreover, plaintiff can point to no evidence that defendant acted in any way to prevent her from discovering her cause of action. Plaintiff's assertions concerning defendant's misrepresentations and promotion of the product does not amount to fraudulent concealment of her cause of action.

Finally, there is no evidence of a fiduciary relationship between plaintiff and defendant. In such a case, mere silence or nondisclosure of material facts does not support a finding of fraudulent concealment. *Wilson v. Retail Credit Co.*, 438 F.2d 1043, 1045 (5th Cir. 1971); *Thomas v. Ford Motor Credit Corp.*, 2:95CV309-P-G (S.D.Miss, Jan. 10, 1997).

Despite her strong belief that the shield was the basis of her problems and the acknowledgement of her physicians that her belief might indeed be well-founded, plaintiff took no steps to seek expert medical opinions or to consult an attorney to inquire if she had a legal claim against the manufacturer. A cause of action accrues and the limitations period begins to run when the plaintiff can be held to have had knowledge of the injury (Kemp *v. G.D. Searle & Co.*, 103 F.3d 405, 408 (5th Cir. 1997), when she has "discovered, or by reasonable diligence should have discovered, the injury." *Owens-Illinois, Inc. v. Edwards*, 573 So.2d. 704, 709 (Miss. 1990). Wilbanks was clearly on notice of her injury and the possible cause more than six years prior to the filing of her claim. Plaintiff has not shown that she exercised reasonable diligence in the pursuit of her convictions.

For these reasons, the motion of defendant for summary judgment will be **granted**. A final judgment in accordance with this opinion will be separately issued.

THIS 8th day of June, 1998.

/s/ Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRLEY WILBANKS PLAINTIFF

V. NO. 1:97CV18-JAD

DALKON SHIELD CLAIMANTS' TRUST DEFENDANT

FINAL JUDGMENT

In accordance with the memorandum opinion issued this day, defendant's motion for summary judgment is **granted** and this cause is **dismissed with prejudice**.

IT IS SO ORDERED.

THIS the 8th day of June, 1998.

/s/ Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE